RECENT CASE NOTES

BANKRUPTCY—JURISDICTION OF FEDERAL COURTS—SUIT ON UNPAID STOCK SUBSCRIPTION.—The trustee of a bankrupt California corporation brought suit in equity in the United States District Court for the Southern District of California against the defendant and about 3,000 other residents of the district to recover overdue balances on unconditional stock subscriptions. The defendant moved to dismiss the bill. *Held,* that the Federal Court had no jurisdiction to entertain the suit. *Kelley v. Gill* (1917) 38 Sup. Ct. 38.

This decision settles an important point, previously uncertain, in the administration of bankrupt corporations. The broad jurisdiction conferred upon bankruptcy courts by section 2(7) of the Bankruptcy Act is restricted by section 23(b), which prohibits the trustee (subject to certain exceptions) from suing a defendant, without his consent, in a court other than that in which the bankrupt might have sued had bankruptcy not intervened. The limits of the federal court's jurisdiction were much clarified by *Bardes v. Hawarden Bank* (1900) 178 U. S. 524, and the 1903 and 1910 amendments to section 23(b). But some authorities still asserted that a suit in equity to collect unpaid stock subscriptions would lie in the district courts. *Skillin v. Magnus* (1907, D. C., N. D. N. Y.) 162 Fed. 689; 7 C. J. 255. In the instant case it was argued that a bill in equity against all the stockholders was authorized by the 1910 amendment to section 47a(2), giving the trustee all the rights, remedies and powers of a judgment creditor; that this was not a suit which the bankrupt itself could have brought and that therefore the suit was not within the prohibition of section 23(b). But the Supreme Court held that the appropriate remedy for the trustee, as well as for the bankrupt, was a separate suit at law against each stockholder, the reason being that there was no common issue between the alleged stockholders and the corporation and therefore no basis for equity taking jurisdiction to avoid a multiplicity of suits at law. It is true that a judgment creditor may sue all the stockholders in equity to reach unpaid stock subscriptions as assets of the debtor corporation. *Harmon v. Page* (1882) 62 Cal. 448. But to the argument that section 47a(2), as amended in 1910, gave the trustee a similar remedy, the court merely replied that the amendment "did not confer new means of collecting ordinary claims due the bankrupt." Whether this was intended as an authoritative interpretation of that amendment is left somewhat doubtful by the additional statement that even if equity were to take jurisdiction to avoid multiplicity of actions at law, the suit could not be brought in the federal court, because the cause of action was one on which the bankrupt could have sued only in a state court. The trustee's power to sue at law in the state courts is clear. *Jeffery v. Selwyn* (1917) 220 N. Y. 77, 115 N. E. 275; *Clevenger v. Moore* (1904) 71 N. J. L. 148, 58 Atl. 88. In the instant case the subscriptions were overdue, so that no order by the bankruptcy court directing payment of subscriptions was a necessary condition precedent to fixing the stockholders' liability. The opinion expressly leaves open the question whether the federal court has jurisdiction when such an order is necessary, either in lieu of a call or for the purpose of pro-rating among the stockholders the amount necessary to be collected to satisfy creditors. *Cf. Scoville v. Thayer* (1881) 105 U. S. 143.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICY RESERVING POWER TO CHANGE BENEFICIARY.—Policies on the bankrupt's life having a cash surrender value were payable to named beneficiaries but reserved to the insured

the power to change the beneficiaries without their consent. The trustee claimed that the bankrupt must either deliver the policies or pay him their cash surrender value. *Held,* that the trustee was entitled to the relief claimed. *Cohen v. Samuels* (1917) 38 Sup. Ct. 36.

The interpretation of section 70a(5) of the Bankruptcy Act has caused much disagreement among the lower federal courts. Clause (5) vests in the trustee property which the bankrupt might by any means have transferred or which was subject to judicial levy and sale, with the proviso that "when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or representatives," he may pay its cash surrender value to the trustee and continue to hold "such policy free from the claims of the creditors . . .; otherwise the policy shall pass to the trustee as assets." This language was capable of two constructions. One line of cases held the view that only policies having a cash surrender value passed to the trustee. *Gould v. N. Y. Life Ins. Co.* (1904, D. C., E. D. Ark.) 132 Fed. 927. Other courts maintained that all policies payable to the bankrupt were vested in the trustee by that portion of clause (5) which preceded the proviso, and that the proviso merely gave the bankrupt a power to redeem such policies as had a cash surrender value by paying this sum to the trustee. *In re Welling* (1902, C. C. A. 7th) 113 Fed. 189; and see Remington, *Bankruptcy* (2d ed.) sec. 1002 *et seq.* The controversy was settled by the Supreme Court in *Burlingham v. Crouse* (1913) 228 U. S. 459, 33 Sup. Ct. 564 and *Everett v. Judson* (1913) 228 U. S. 474, 33 Sup. Ct. 568. These cases held that the interest of the trustee in life insurance policies extended only to their cash surrender value determined as of the date of the filing of the bankruptcy petition. On the strength of these decisions it has been thought by some authorities that the trustee's sole source of title is the proviso, and that consequently a policy not expressly payable to the bankrupt, his estate or representatives, does not pass to the trustee, even though the bankrupt has the power to change the beneficiary at will and thus obtain for himself the cash surrender value of the policy. This was the holding of the District Court and of the Court of Appeals in the instant case. *In re Samuels* (1917, C. C. A. 2d) 237 Fed. 796. See also Remington, *Bankruptcy* (2d ed.) sec. 1009; *In re Arkin* (1916, C. C. A. 2d) 231 Fed. 947; *cf. In re Hammel* (1915, C. C. A. 2d) 221 Fed. 56. But see *contra: Malone v. Cohn* (1916, C. C. A. 5th) 236 Fed. 882; *In re Bonvillain* (1916, E. D. La.) 232 Fed. 370; *In re Shoemaker* (1915, E. D. Pa.) 225 Fed. 329. Fortunately the dispute has now been settled by supreme authority and the more liberal interpretation finally established. The court did not deem it necessary to support its decision by any extended argument. The fact that the policies, while not payable to the bankrupt, could be made so at his will and by his simple declaration, was thought to bring the case within the proviso, even if that were regarded alone. But the court also buttressed its decision by a reference to clause (3) of section 70a which confers upon the trustee all powers which the bankrupt might have exercised for his own benefit. Whether the reference to clause (3) was intended as an argument in support of the court's construction of the proviso, or as an assertion that the bankrupt's power to change the beneficiary passed to the trustee by virtue of clause (3), does not clearly appear.

CARRIERS—STATE REGULATION OF RATES—COMMUTATION TICKETS.—A railroad company sought an injunction to restrain the Public Service Commission of Maryland from enforcing an order revising a schedule filed by the company of proposed increases in its voluntarily established commutation rates for intrastate passenger service. *Held,* that the injunction was properly refused since, in a case where the railroad had itself established special commutation rates, the